Supreme Court, U.S.

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No. 97-

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

LINDA TACKETT and GRAYSON TACKETT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Samuel Manly
Counsel for Petitioners
LAW OFFICES OF SAMUEL MANLY
1606 Kentucky Home Life Building
Louisville, Kentucky 40202-3208
Telephone (502) 585-4619
Facsimile (502) 583-5960

52 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether 18 U.S.C. § 1503 prohibits witness tampering?

II. Whether, when a witness is subpoenaed to appear and testify before a grand jury but after his appearance and testimony before that grand jury has been excused, an endeavor to influence his testimony is prohibited by 18 U.S.C. § 1503?

LIST OF PARTIES

The parties to the proceedings below were Linda Tackett, Grayson Tackett and the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Linda Tackett and Grayson Tackett, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on May 15, 1997.

OPINION BELOW

The May 15, 1997 opinion of the Court of Appeals, whose judgment herein is sought to be reviewed, is reported at *United States v. Tackett*, 113 F.3d 603 (6th Cir. 1997); is cited electronically as 1997 FED App. 0157P (6th Cir.); has the File Name 97a0157p.06; and is reprinted in the Appendix to this petition at pp. A-1 to A-28.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1997.

A timely petition for rehearing was denied on June 23, 1997.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES. ORDINANCES AND REGULATIONS INVOLVED

TITLE 18, UNITED STATES CODE

§ 1503. Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examina-tion or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years or both.

[*Amended by* Act of Sept. 13, 1994, Pub.L. 103-322, Title VI, § 60016, Title XXXIII, § 330016, 108 Stat. 1974, 2147.]

§ 1512. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to--

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is--

(A) in the case of a killing, the punishment provided in sections 1111 and 1112 of this title; and

(B) in the case of an attempt, imprisonment for not more than twenty years.

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document,

or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from--

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or

assisting in such prosecution or proceeding;
or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section--

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction over an offense under this section.

(h) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

[*Amended by* Act of Sept. 12, 1994, Pub.L. 103-322, Title VI, § 60018, Title XXXIII, § 330016(1)(O), (U), 108 Stat. 1975, 2148; Act of Oct. 1, 1996, Pub.L. 104-214, § 1(2), 110 Stat. 3017; Act of Oct. 11, 1996, Pub.L. 104-294, Title VI, § 604(b)(31), 110 Stat. 3508.]

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section--

(1) the term "official proceeding" means--

(A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Claims Court, or a Federal grand jury;

(B) a proceeding before the Congress; or

(C) a proceeding before a Federal Government agency which is authorized by law;

(2) the term "physical force" means physical action against

another, and includes confinement;

(3) the term "misleading conduct" means--

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant--

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term "bodily injury" means--

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

[*Amended by* Act of Sept. 13, 1994, Pub.L. 103-322, Title XXXII, § 320604(a), 108 Stat. 2118; Act of Oct. 11, 1996, Pub.L. 104-292, § 3, 110 Stat. 3460; Act of Oct. 11, 1996, Pub.L. 104-294, Title VI, § 604(b)(39), 110 Stat. 3509.]

STATEMENT OF THE CASE

Petitioners seek review of the judgment of the Court of Appeals for the Sixth Circuit, affirming their convictions in the district court for the Western District of Kentucky under 18 U.S.C. § 1503 for corruptly endeavoring to influence the testimony of a grand jury witness. The district court for the Western District of Kentucky was the court of first instance and had exclusive original subject matter jurisdiction under 18 U.S.C. § 3231.

On December 6, 1991, petitioners' son Brian Tackett burned a church. In June of 1992, he and others were charged with conspiracy to commit arson, and Brian alone was charged and eventually convicted of arson, interstate transportation of a stolen vehicle and carrying a firearm during a crime of violence.[1]

The government sought to prove that Brian carried a particular .45 caliber Colt semiautomatic pistol when he burned the church. Since that pistol was not recovered as evidence, the government sought to prove that it was the same pistol which Brian had bought from Steve Kirby, a licensed firearms dealer, during the first few months of 1991. Kirby, however, had neither recorded the sale in his required records nor seen to the completion of the required ATF form (ATF Form 4773) reflecting the sale of the pistol to Brian.

Intending to assist in his son Brian's defense, petitioner

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[1]The facts of Brian's case are set out in United States v. Pierce, 62 F.3d 818 (6th Cir. 1995).

Grayson Tackett visited Kirby in September of 1992, and had Kirby to complete an ATF Form 4773 showing that Grayson Tackett purchased the pistol on December 16, 1991 -- ten days after the church was burned.

Brian's trial was set to commence on March 15, 1993.

In early 1993[2], petitioner Linda Tackett obtained a copy of the falsified ATF Form 4773 from Kirby, and furnished it to Brian's lawyer, who filed a motion on February 16, 1993 to dismiss the firearm charge against Brian and supported the motion with a copy of the false ATF Form 4773.

The ATF Form 4773 came to the attention of ATF Special Agent Raymond Wilt, who evidently suspected that it may have been falsified.

On February 22, 1993, Agent Wilt visited Kirby at his place of business; obtained the original of the falsified ATF Form 4773; and took a sworn, tape recorded statement from Kirby in which Kirby stood by the information contained on the form.

On Wednesday March 3, 1993, when Agent Wilt interviewed Kirby at the ATF office in Bowling Green, Kentucky, Kirby changed his story and said that Brian Tackett, not petitioner Grayson Tackett, had purchased the pistol; that the date of purchase was sometime in the first quarter of 1991; that the Form 4773 had first been completed accurately; that it may thereafter have been altered by person or persons unknown; and that the only person who had the

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[2] Incorrectly dated as, "In the spring of 1992," in the Court of Appeals' opinion.

form out of Kirby's sight was petitioner Linda Tackett.

On Thursday March 4, 1993, Assistant United States Attorney A. Duane Schwartz scheduled a meeting of the grand jury for Monday March 8, 1993, to inquire into the accuracy of the form and the circumstances surrounding it. He then had a subpoena prepared and issued for Kirby's appearance before that grand jury on Monday March 8; and gave the subpoena to Agent Wilt for him to serve on Kirby.

When Kirby came to the ATF office in Bowling Green, on Thursday March 4, 1993, Agent Wilt served him with the subpoena for his appearance before the grand jury on Monday March 8. Agent Wilt and AUSA Schwartz then interrogated Kirby.

During his interrogation on Thursday, March 4, 1993, and after he had been served with the grand jury subpoena, Kirby admitted that Brian Tackett bought the pistol in the first quarter of 1991, well before the church was burned; that no one completed ATF Form 4773 at the time the sale was made; that sometime in September or October of 1992, petitioner Grayson Tackett came to Kirby's shop insisting that he had bought the pistol on December 16, 1991; and that he and petitioner Grayson Tackett thereupon completed the ATF Form 4773 to reflect a December 16, 1991 sale of the pistol to petitioner Grayson Tackett.

AUSA Schwartz admitted at petitioners' trial that on March 4, 1993, when Kirby confessed and implicated himself and petitioners in the falsification of the ATF Form 4773, he made a determination to excuse Kirby's appearance before the

grand jury. Schwartz repeatedly denied that he excused, withdrew or canceled the subpoena, but affirmed and reaffirmed that he determined to excuse Kirby's compliance with the subpoena.[3]

Instead, Schwartz and Wilt devised a plan whereby they would use Kirby to gather additional evidence against petitioners by placing telephone calls to petitioners and arranging meetings with them which would be tape recorded. They instructed Kirby to place the first such telephone call from the ATF office that very day.

During that March 4 telephone call, made at the behest of AUSA Schwartz and Agent Wilt, Kirby told petitioner Grayson Tackett that he had been served with a grand jury subpoena for his appearance on Monday, March 8, 1993; that the date on the ATF Form 4473 was being investigated; that Kirby and petitioner Grayson Tackett "both knew that the form wasn't correct;" that Kirby wanted petitioners Grayson and Linda Tackett to tell him what to say to the grand jury; and that Kirby and petitioners should have a face-to-face meeting on Friday, March 5, 1993, to discuss these matters further. Petitioner Grayson Tackett made no statements of any significance during that telephone conversation.

Petitioners took the bait.

On Friday morning, March 5, 1993; Friday afternoon, March 5, 1993; and Sunday evening, March 7, 1993, believing

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[3] Schwartz's distinction between withdrawing or canceling the subpoena and excusing Kirby's compliance with the subpoena appears to be one without a difference.

that Kirby was to appear and testify before the grand jury on Monday March 8, 1993, petitioners endeavored to persuade Kirby to testify falsely before that grand jury as to the sale of the .45 caliber Colt semiautomatic pistol to Brian Tackett in early 1991 and as to the authenticity of the ATF Form 4773. Petitioners' endeavors were captured on audio tape recordings made by ATF agents of petitioners' meetings and telephone conversations with Kirby on those two days.

Agent Wilt told Kirby on Saturday evening, March 6, or Sunday morning, March 7, that AUSA Schwartz had excused Kirby's March 8 appearance and testimony before the grand jury. AUSA Schwartz confirmed to Kirby on the evening of March 7 that his appearance and testimony on Monday March 8 were excused.

Kirby did not testify before any grand jury.

On Monday, March 8, 1993, Agent Wilt testified before the grand jury and his testimony resulted in the return that same day of a two-count indictment against petitioners. Count 1 charged petitioner Grayson Tackett only with making a false statement on an ATF Form 4473. Count 2 charged petitioners Grayson Tackett and Linda Tackett with corruptly endeavoring to influence, obstruct and impede the due administration of justice on March 5, 1993, by asking Kirby to testify falsely under oath before a grand jury before which he was subpoenaed to testify on March 8, 1993, in violation of 18 U.S.C. § 1503.

On February 22, 1995, a superseding indictment was returned, in which Count 1 charging petitioner Grayson

Tackett with falsifying the ATF Form 4773 was reiterated *verbatim*; Count 2 was amended, so as to charge petitioners Grayson Tackett and Linda Tackett with corruptly endeavoring to influence, obstruct and impede the due administration of justice *between* March 5, 1993, *and* March 7, 1993, by asking Kirby to give false testimony under oath to a grand jury testimony on March 8, 1993, in violation of 18 U.S.C. § 1503. A new Count 3 was added, in which petitioners Grayson Tackett and Linda Tackett were charged with corruptly endeavoring to influence, obstruct and impede the due administration of justice between September 1, 1992, and February 16, 1993, by creating and causing the filing of the a false and fabricated ATF Form 4473, in violation of 18 U.S.C. § 1503.

On May 2, 3 and 4, 1995, the three counts of the superseding indictment against petitioners were tried to a jury, Honorable Edward H. Johnstone, Senior United States District Judge presiding.

A judgment of acquittal was entered at the conclusion of the evidence as to both petitioners on Count 3 of the superseding indictment.

Petitioner's motion for a judgment of acquittal as to Counts 1 and 2 of the superseding indictment was denied.

On May 4, 1995, the trial jury returned a verdict of guilty as to petitioner Grayson Tackett on Count 1 of the superseding indictment, and as to each of petitioners Grayson Tackett and Linda Tackett on Count 2 of the superseding indictment.

Petitioners' timely post-trial motions for a judgment of acquittal and for a new trial were denied.

On August 4, 1995, petitioner Grayson Tackett was sentenced to serve eighteen (18) months in prison and to pay a fine of $4,000.00; and petitioner Linda Tackett was sentenced to serve twenty-one (21) months in prison and to pay a fine of $4,000.00.

Judgments of convictions were entered for petitioners on August 9, 1995.

Petitioners timely appealed to the Court of Appeals for the Sixth Circuit on August 14, 1995.

On May 15, 1997, the Court of Appeals affirmed petitioners' convictions but vacated their sentences and remanded the case for resentencing.

Petitioners timely requested rehearing in the Court of Appeals on May 29, 1997. Their petition for rehearing was denied by order entered June 23, 1997.

As of the date of this petition, petitioners have not been resentenced and remain free on bond pending this Court's determination of their petition.

On their appeal to the Court of Appeals, petitioners raised the issue that Count 2 of the superseding indictment does not state facts sufficient to constitute an offense under 18 U.S.C. § 1503 and that the trial court erred when it denied petitioners' motion to dismiss that count, because § 1503 does not prohibit corruptly endeavoring to influence the testimony of a grand jury witness. The Court of Appeals considered and rejected that argument.

Petitioners raised the additional issue that the evidence at trial, viewed in the light most favorable to the government, was insufficient to convict petitioners of obstruction of justice in violation of 18 U.S.C. § 1503, as charged in Count 2 of the superseding indictment, because Kirby's grand jury testimony was not being sought and was not "presently contemplated" when petitioners engaged in the conduct charged in Count 2. The Court of Appeals likewise considered and rejected that argument.

REASONS FOR GRANTING THE WRIT

I.
CONFLICT IN CIRCUITS AS TO WHETHER 18 U.S.C. § 1503 PROHIBITS WITNESS TAMPERING SHOULD BE RESOLVED

The writ should be allowed as to Question I, to resolve the conflict among the Circuits as to whether 18 U.S.C. § 1503 prohibits witness tampering, because it is an important matter affecting the administration of the criminal law of the United States as to which the courts of appeal are divided.

When Congress enacted the Victim and Witness Protection Act of 1982, Act of Oct. 12, 1992, Pub.L. 97-291, 96 Stat. 1248 ["VWPA"], it not only added 18 U.S.C. §§ 1512-1515 to the law but deleted all references to witnesses in 18 U.S.C. § 1503.

As amended in 1982, 18 U.S.C. § 1503 prohibits four (4) categories of behavior:

First: "Whoever corruptly or by threats or corce, or

by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty. . . ."

Second: "[Whoever] . . . injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror . . . ."

Third: "[Whoever] . . . injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties . . ."

and,

Fourth: "[Whoever] . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice...

shall pay a fine, or go to prison, or both.

Since the enactment of VWPA, all murders, attempted murders, intimidation, physical force, threats, corrupt influences, corrupt persuasion, harrassment and attempts thereat aimed at witnesses, victims and informants and designed to hinder, delay, or prevent the communication or delivery of information and things to law enforcement officers

or judges are prohibited by 18 U.S.C. § 1512; and retaliation against such categories of persons is prohibited by 18 U.S.C. § 1513.

To the extent VWPA omitted to punish "corrupt" influences aimed at witnesses, victims and informants, *see United States v. King*, 762 F.2d 232 (2d Cir. 1985); its omission was cured by the passage of an amendment to 18 U.S.C. § 1512 contained in the Anti-Drug Abuse Act of 1988, Act of Nov. 18, 1988, Pub.L. 100-690, 102 Stat. 4181 ["ADA"].

The question presented is whether the "omnibus" or fourth clause of 18 U.S.C. § 1503 still prohibits witness tampering.

The Sixth Circuit in *United States v. Tackett*, 113 F.3d 603 (6th Cir. 1997) joined the majority of the circuits which have considered the question by holding that 18 U.S.C. § 1503 remains available after VWPA and ADA as a means of punishing witness tampering. *See United States v. Marrapesa*, 826 F.2d 145 (1st Cir. 1987) [pre-ADA]; *United States v. Kenny*, 973 F.2d 339, 342-343 (4th Cir. 1992); *United States v. Wesley*, 748 F.2d 962, 964-65 (5th Cir. 1984) [pre-ADA]; *United States v. Branch*, 850 F.2d 1080 (5th Cir. 1988) [pre-ADA]; *United States v. Williams*, 874 F.2d 968 (5th Cir. 1989); *United States v. Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985) [pre-ADA]; *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995); *United States v. Riskin*, 788 F.2d 1361 (8th Cir. 1986) [pre-ADA]; *United States v. Brown*, 948 F.2d 1076 (8th Cir. 1991); *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984) [pre-ADA]; *United States v. Kulczyk*, 931

F.2d 542 (9th Cir. 1991); and *United States v. Moody*, 977 F.2d 1420, 1424 (11th Cir. 1994) [pre-ADA].

The Second Circuit took the opposite view after VWPA in *United States v. Hernandez*, 730 F.2d 895, 898-99 (2d Cir. 1984), and reaffirmed that view post-ADA in *United States v. Masterpol*, 940 F.2d 760, 762 (2d Cir. 1991).

Evidently the question has not been addressed at all in the Third, Tenth and District of Columbia Circuits.

The absence of uniformity of interpretation of this important question of federal law continues to occupy the resources of the Courts of Appeal and of litigants. In *Tackett, supra*, the Sixth Circuit analyzed the question afresh and not by reference to the decisions of other Circuits. While petitioners disagree with its reasoning and its result, *Tackett* presents an excellent opportunity for this Court to bring much-needed uniformity and finality to this oft-litigated issue.

II.
IMPORTANT QUESTION OF FEDERAL LAW OF FIRST IMPRESSION WHETHER, WHEN A WITNESS IS SUBPOENAED TO APPEAR AND TESTIFY BEFORE A GRAND JURY BUT AFTER HIS APPEARANCE AND TESTIMONY BEFORE THAT GRAND JURY HAS BEEN EXCUSED, AN ENDEAVOR TO INFLUENCE HIS TESTIMONY IS PROHIBITED BY 18 U.S.C. § 1503, SHOULD BE RESOLVED BY THIS COURT

In *Tackett, supra*, the Sixth Circuit held as a matter of apparent first impression that even though there was no

presently contemplated presentation of evidence by Kirby before the grand jury when on March 5 and March 7, 1993, petitioners attempted to influence what they believed would be his grand jury testimony on March 8, 1993, petitoners nevertheless violated 18 U.S.C. § 1503 because the grand jury subpoena issued to Kirby was issued in furtherance of an actual grand jury investigation and the requisite present intention to procure Kirby's testimony before the grand jury existed when Kirby was subpoenaed. *Tackett*, 113 F.3d at 611-612 & n.6.

The Sixth Circuit's view attributes supreme importance to state of facts which exists when a grand jury subpoena is issued and served, and no importance at all to the state of facts which exists as of the date of the alleged violation of law.

As the court below correctly noted, petitioners did not argue on appeal that the principle announced in *United States v. Aguilar*, 515 U.S. 595 (1995) that the "endeavor must have the natural and probable effect of interfering with the due administration of justice" barred their conviction. *Tackett*, 113 F.3d at 612 & n.5. That court was nevertheless of the opinion that it does not, and that *Aguilar*'s requirement "serves merely to ensure that defendants are not convicted for making false statements unless they have some notice that those falsehoods might have some effect on a judicial proceeding," which requirement the court found was "clearly met in this case." *Tackett*, 113 F.3d 612 & n.5.

Such an expansive view of the scope not only of 18 U.S.C. § 1503, if it applies to witness tampering at all, is

unwarranted. The importance of *Tackett*'s holding extends beyond the bounds of § 1503, since the same principle could be applied to a prosecution under 18 U.S.C. § 1512 so as to extend the reach of that statute beyond its language which already negates the requirement of § 1503 and its jurisprudence that an official proceeding must be pending or about to be instituted at the time of the offense. *Compare* 18 U.S.C. § 1512(e)(1) *with Pettibone v. United States*, 148 U.S. 197 (1893).

This Court should grant the writ to address and resolve this important issue of federal law of apparent first impression.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

Samuel Manly

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

CITATION: 113 F.3d 603 (6th Cir. 1997)

ELECTRONIC CITATION: 1997 FED App. 0157P (6th Cir.)
File Name: 97a0157p.06

Nos. 95-6127/6128

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LINDA TACKETT (95-6127);
GRAYSON TACKETT (95-6128),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Kentucky

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Argued Oct. 16, 1996.

Decided and Filed May 15, 1997.
Rehearing and Suggestion for Rehearing En Banc Denied June 23, 1997.

A. Duane Schwartz, Assistant United States Attorney, Terry M. Cushing, Assistant United States Attorney, John L.

Caudill, Assistant United States Attorney (briefed), David J. Hale (argued), Office of the United States Attorney, Louisville, Kentucky, for Plaintiff-Appellee.

Samuel Manly (argued and briefed), Louisville, Kentucky, for Defendants-Appellants.

Before: JONES, RYAN, and MOORE, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Linda and Grayson Tackett appeal their convictions and sentences in this case involving obstructing justice and making a false statement on a required firearm record. For the reasons discussed below, we affirm the convictions but remand both cases to the district court for resentencing.

I. FACTS

On December 6, 1991, appellants' son Brian Tackett burned down a church.[1] In June of 1992 he and several others were charged with conspiracy to commit arson; Brian alone was accused and eventually convicted of arson, transporting a stolen vehicle, and carrying a firearm during a crime of violence.

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[1]Brian Tackett apparently maintains that he did not in fact commit the arson. In light of the jury's verdict below, we construe all disputed facts in favor of the government. See *Chatman v. Slagle*, 107 F.3d 380, 381 n. 3 (6th Cir.1997). In addition, this court upheld his conviction for the burning. *United States v. Pierce*, 62 F.3d 818 (6th Cir.1995). The facts surrounding the arson are set out in that opinion.

Between the time that the younger Tackett was indicted and the date of his trial, his parents attempted to sabotage the government's firearms case by falsifying records and attempting to influence Steve Kirby, a potential witness in the case. The government accused Brian Tackett of carrying a .45 caliber pistol when he burned the church. He had obtained this gun sometime during the first few months of 1991 from Kirby, a licensed firearms dealer, but the sale had not been recorded in Kirby's transfer log, and the proper form (ATF Form 4473) had not been completed. J.A. at 247-49. *See* 27 C.F.R. §§ 178.124, 178.125(e) (required firearm records). In September of 1992, appellant Grayson Tackett paid Kirby a visit to ask him to complete a Form 4473 for the purchase, but to record him (Grayson) as the purchaser and December 16, 1991-- ten days after the church burning--as the date of transfer. J.A. at 249. Kirby did not at the time realize the significance of the false date and agreed to falsify the form. *Id.* at 249-50.

In the spring of 1993 Linda Tackett visited Kirby and asked him for a copy of the falsified form 4473. *Id.* at 251-52. She gave the document to her son's lawyer, who then filed a motion to dismiss the firearm charge on the grounds that Brian could not have carried the pistol during the arson because it was still in Kirby's shop at the time. *Id.* at 252, 173-74. The form eventually found its way to Raymond Wilt, the ATF agent in charge of the arson investigation, who apparently suspected that the form had been falsified and decided to investigate. *Id.* at 168, 174-75. During the next week Wilt interviewed Kirby several times about the form. Kirby initially claimed that the form was correct, but, on March 4, when Wilt served him with a subpoena to appear before the grand jury that was investigating the accuracy of the form, Kirby came clean and told Wilt about the original sale and Grayson

Tackett's visit. *Id.* at 175-81.

Wilt was apparently not satisfied that Kirby's new story was true.[2] *Id.* at 182, 256. He instructed Kirby to arrange a meeting with the Tacketts and gave him two miniature tape recorders to use at that meeting. *Id.* at 183. The resulting recordings, which were played at trial, *id.* at 279-280, 303, made it clear that the new, not the old, story was the true one, and that the Tacketts were asking Kirby to perjure himself before the grand jury. In the March 7 meeting, for example, Kirby read aloud a letter that, according to his trial testimony, Linda Tackett had written and her husband had given him. *Id.* at 304-05. The letter instructed Kirby that "[a]ll you know is you never sold Brian Tackett any guns.... The only people that know the real truth are Grayson and me [Linda].... You had a .45 Colt to sell and sold it to Grayson Tackett on December 16th, 1991. It was in your possession prior to December 16th, so it couldn't have been anywhere else.... If Brian Tackett was ever at your office you don't remember it." Tape of March 7, 1993.

Wilt testified as to this evidence before the grand jury, which then handed down an indictment against the Tacketts for obstruction of justice and against Grayson Tackett for falsifying a required firearm record.[3] J.A. at 209, 23-24 (indictment). A jury convicted both defendants of obstruction of justice, under 18 U.S.C. § 1503, and Grayson of falsifying

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[2] Appellants argue that Wilt knew quite well that Kirby's new story was true, and set up the tape-recorded interview solely to collect evidence to charge them with obstruction of justice. As noted above in footnote 1, we view the evidence in the light most favorable to the government.

[3] An additional count against each defendant was dismissed. J.A. at 29, 60.

the ATF form, under 18 U.S.C. § 924(a)(1)(A). *Id.* at 29, 60 (judgments in criminal case). Appellants filed this timely appeal, giving us jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. Whether 18 U.S.C. § 1503 Prohibits Witness Tampering

The most complicated issue that appellants raise is whether the United States may prosecute their attempt to influence Kirby's anticipated testimony before the grand jury under 18 U.S.C. § 1503. The Second Circuit has held that the enactment of new witness protection laws in 1982 and 1988 means that the government must now prosecute witness tampering under the new law, 18 U.S.C. § 1512, rather than under § 1503. *See United States v. Masterpol*, 940 F.2d 760, 762 (2d Cir. 1991). The other circuits that have addressed the issue have reached the opposite conclusion. *See United States v. Maloney*, 71 F.3d 645, 659 (7th Cir. 1995) (noting that Fourth, Ninth, and Eleventh Circuits have held that the omnibus clause of § 1503 continues to cover witness tampering); *United States v. Kenny*, 973 F.2d 339, 342-43 (4th Cir. 1992) (same for First, Fifth, Eighth, and Ninth Circuits). *See also United States v. Aguilar*, 515 U.S. 593, 600 & n. 1 (1995) (declining to address issue). *Cf. id.* at 615 (Scalia, J., dissenting) (arguing that witness tampering can be prosecuted under § 1503). We agree with the majority of these courts that § 1503 continues to prohibit witness tampering.

Since its original enactment in 1948, § 1503 has contained both specific prohibitions against particular acts and a general "omnibus clause" providing for the punishment of any person

who "corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Act of June 25, 1948, ch. 645, 62 Stat. 769-70 (codified as amended at 18 U.S.C. § 1503(a)). *See generally Aguilar*, 515 U.S. at 598-599. The omnibus clause was intended to ensure that criminals could not circumvent the law's purpose by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of § 1503's specific prohibitions. *See United States v. Schaffner*, 715 F.2d 1099, 1103 (6th Cir. 1983). The clause has been used to prosecute both crimes that clearly fell within § 1503's more specific provisions and also conduct that those provisions could not reach. *Compare Schaffner*, 715 F.2d at 1103 (omnibus clause prohibits hiding witness even though such conduct is not covered by specific provisions); *United States v. Faudman*, 640 F.2d 20, 23 (6th Cir. 1981) (upholding conviction for conduct not explicitly prohibited in specific provisions because "[u]nless something more than the precise acts listed in the earlier language was intended for inclusion, the 'omnibus' language of § 1503 would be surplusage"), *with United States v. Neiswender*, 590 F.2d 1269, 1272 n. 1 (4th Cir. 1979) (upholding conviction under omnibus clause where "[t]he failure to indict under the first clause of [§ 1503] is unexplained"); *Anderson v. United States*, 215 F.2d 84, 87-88 (6th Cir. 1954) (upholding conviction under omnibus clause for offering to alter witnesses' testimony).

The Tacketts do not claim that the omnibus clause never prohibited witness tampering; our prior decisions foreclose such an argument. *See Schaffner*, 715 F.2d at 1103; *Faudman*, 640 F.2d at 23; *Anderson*, 215 F.2d at 87-88. Appellants instead argue that when Congress enacted new protections for witnesses in 1982 and 1988 it intended that

such crimes be punished only under the new provisions in 18 U.S.C. §§ 1512 & 1513, rather than under § 1503. We do not believe that Congress intended to preclude the use of the omnibus clause of § 1503 in such prosecutions.

As an initial matter, we note that the precise question before us is whether the 1982 and 1988 legislation in effect repealed the omnibus clause as it applies to witness tampering. Before 1982, we had interpreted the clause to prohibit such conduct; if we are now to change that view based on new legislation, it must be that the new law has repealed the old, either explicitly or by implication. This is the framework that Justice Brandeis used in *United States v. Noveck*, 273 U.S. 202, 206 (1927), to address the similar argument that the enactment of a criminal statute prohibiting, inter alia, the filing of a false tax return meant that Congress intended that such conduct could no longer be punished under the general perjury statute. *Id.* ("The argument is that [the new statute] includes within its condemnation any one 'who willfully attempts in any manner to defeat or evade the tax imposed by this title'; that perjury to an income tax return is one manner or method of defeating or evading the tax; and that, since all methods are made punishable under [the new statute], Congress must have intended that perjury in making false returns should no longer be punishable under [the general perjury statute]."). Similarly, in *United States v. Gilliland*, 312 U.S. 86 (1941), the Court construed the question of whether a new statute limited the scope of a pre-existing criminal statute as one of whether the later statute repealed in part the prior one. *Id.* at 95 (discussing "the contention that the [later Act] operated to repeal [the earlier statute], so far as the latter applied to affidavits, documents, etc."). *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (per curiam) (claim that later statute has superseded earlier one must be analyzed as "implicit partial

repeal"). In light of these holdings, the question before us is whether the 1982 and 1988 legislation operated to repeal the omnibus clause insofar as it prohibits witness tampering. We review de novo this question of statutory construction. *United States v. Spinelle*, 41 F.3d 1056, 1057 (6th Cir. 1994).

The 1982 and 1988 legislation did not alter the text of the omnibus clause, and appellants have not pointed to anything in the new laws that states that the omnibus clause no longer prohibits witness tampering. Where it is claimed that a statute has been repealed, but there is no explicit repeal,

> the question resolves itself into the more narrow inquiry, whether [the older law] has been repealed by necessary implication. We say, by necessary implication; for it is not sufficient to establish, that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old; and even then, the old law is repealed by implication, only pro tanto, to the extent of the repugnancy.

Wood v. United States, 41 U.S. (16 Pet.) 342, 362-63, (1842). More recent jurisprudence qualifies this rule somewhat: if Congress clearly intends to repeal the former law but merely fails to say so explicitly, a court should accede to the legislative intent. *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 109, (1991); *Spinelle*, 41 F.3d at 1059. This qualification does not overrule the Wood's statement of the law; it merely recognizes that "in the process of construing a statute the intent of the legislature is always of prime importance." 1A NORMAN J. SINGER,

SUTHERLAND STATUTES AND STATUTORY CONSTR. § 23.09 (5th ed.1992). *See id.* ("As the legislative intent defines the operation of the statute and divulges the purpose and limitations of the enactment, it may establish or deny a repeal by implication."). It is clear that the provisions of § 1503 and § 1512 are not "repugnant" to each other; they are entirely consistent. *See Spinelle*, 41 F.3d at 1060. We can find an implicit repeal, then, only if Congress has clearly expressed an intent that there be one.

1. The 1982 Act

Congress enacted the Victim and Witness Protection Act of 1982 to protect victims of, and witnesses to, federal crimes from criminals and from the potential callousness of the criminal justice system. See Victim and Witness Protection Act of 1982, Pub.L. 97-291 § 2, 96 Stat. 1248, 1248-49 [hereinafter VWPA] (Congressional Findings and Purposes). Congress was concerned that witnesses to federal crimes faced threats, intimidation, and physical harm from the criminals that they helped to convict, *id.* § 2(a)(4), and also that the system itself "simply used [them] as tools to identify and punish offenders." *Id.* § 2(a)(1). Most relevant to the case at bar is section 4(a) of the Act, codified at 18 U.S.C. §§ 1512-15, which creates specific new statutory sections imposing criminal sanctions for harassing, harming, or threatening to harm witnesses or former witnesses and allows courts to issue civil injunctions against such harassment. Congress enacted these new provisions because it believed that § 1503's protections, which are focused on protection of the judicial process, did not provide adequate protection for the lay people involved with that process. For example, § 1503 applies only when there is a judicial proceeding underway. *Pettibone v. United States*, 148 U.S. 197, 207 (1893)

(construing predecessor to § 1503); *United States v. Mullins*, 22 F.3d 1365, 1370 (6th Cir. 1994). The 1982 Act extended protection to anybody who might provide information in a later proceeding or who had testified in a former proceeding. *See* 18 U.S.C. §§ 1512, 1513. Furthermore, the law is not limited to formal witnesses: the text of the VWPA refers to "persons" rather than "witnesses" or "victims" so as to make clear that it protects anyone who may have knowledge of a crime. *See* S. REP. NO. 97-532, at 15 (1982), *reprinted in* 1982 U.S.C.A.A.N. 2515, 2521 ("The scope of the offense should not be limited by concerns about the status of the victim as a person who has testified or will be able to testify in court. Rather, the offense should be addressed to punishing the acts of intimidating or injuring a person because of his knowledge about the commission of a crime."). *See also id.* at 14-15 (noting problems with old law). The 1982 statute was meant to protect people, not just "witnesses" or the criminal justice system.

In keeping with this purpose, the VWPA did not prohibit non-coercive witness tampering: it allowed the prosecution only of persons who used "intimidation or physical force, or threat[s] ... or misleading conduct" to try to influence a witness. VWPA § 4(a) (codified at 18 U.S.C. § 1512(a) (1982)). Similarly, the other new provisions of the 1982 Act were aimed only at preventing harassment of or threats against witnesses, victims, and informants. *See id.* (codified at 18 U.S.C. §§ 1513, 1514 (1982)). Thus, under the 1982 Act, the Tacketts' attempt to influence Kirby would not even be actionable under any of these sections: they neither threatened him nor attempted to mislead him. *See United States v. King*, 762 F.2d 232, 238 (2d Cir. 1985).

With these legislative purposes in mind we now turn to the

question of what effect Congress intended the 1982 statute to have on the omnibus clause's scope. The Second Circuit based its conclusion that the clause no longer covers witness tampering on two pieces of evidence. *United States v. Hernandez*, 730 F.2d 895, 898-99 (2d Cir. 1984). First, the VWPA deleted all references to witnesses from § 1503's more specific clauses and caption. *Id.* Second, a Senator stated for the record that § 1503 would no longer provide protection to witnesses. *Id.* at 899. We address each of these in turn.

We do not believe that Congress's deletion of § 1503's specific references to witnesses indicates an intent to withdraw this one class of conduct--witness tampering--from the purview of the omnibus clause. As noted above, Congress believed that the word "witness" was unduly restrictive and intended the new §§ 1512-15 to have a broader scope. In light of the new sections, there was no need to retain the more restrictive language pertaining to witnesses in § 1503. See 128 CONG. REC. H26,352 (1982) (statement of Rep. Rodino) (section-by-section analysis of bill, stating that "[t]he amendments delete language from section 1503 pertaining to witness intimidation and retaliation because the conduct dealt with by that language is covered in new sections 1512 and 1513") (emphasis added). This deletion of the specific provision regarding witnesses in § 1503 does not necessarily demonstrate an intent to restrict the scope of the omnibus clause of § 1503, the text of which was unaffected by the 1982 law, for Congress may amend one part of a statute without changing the remainder. Nor is the scope of the omnibus clause dependent on that of the specific provisions; it has long been used to prosecute conduct that goes far beyond the scope of § 1503's caption and specific prohibitions. *See Mullins*, 22 F.3d at 1368 (altering subpoenaed documents); *United States v. Sturman*, 951 F.2d 1466, 1479 (6th Cir.

1991) (destroying and concealing documents); *United States v. Jeter*, 775 F.2d 670, 676-77 (6th Cir. 1985) (obtaining and selling grand jury transcripts), *cert. denied*, 475 U.S. 1142 (1986); *Faudman*, 640 F.2d 20, 21, 23 (6th Cir. 1981) (altering subpoenaed documents). Furthermore, if the 1982 Act had removed witness tampering from the scope of the omnibus clause it would essentially have decriminalized non-coercive obstruction of justice involving witnesses. *See King*, 762 F.2d at 238. There is, of course, absolutely no indication that Congress intended that the VWPA make it legal to obstruct justice. We therefore conclude that the deletion of the word "witness" from § 1503 does not in itself demonstrate any congressional intent to repeal the omnibus clause insofar as it prohibits witness tampering. *Cf. Wood*, 41 U.S. (16 Pet.) at 365 (calling it "impossible ... to contend that [an earlier statute] is repealed in toto, since no subsequent act covers all the cases provided for by it"). To the extent that there is any room for doubt in this conclusion, we are nonetheless quite certain that the change in § 1503 does not demonstrate the clear intent that is necessary to effect an implicit repeal.

The second piece of evidence that the *Hernandez* court cites in support of its holding is even less persuasive. That court noted that Senator Heinz, whom it described as "a prime mover of the bill," had stated on the floor of the Senate that the law as passed "amends section 1503 so it will make no mention of, and provide no protection to, supenaed [sic] witnesses." *Hernandez*, 730 F.2d at 899 (quoting 128 CONG. REC. S26,810 (1982)) (emphasis deleted from Hernandez). The remainder of Senator Heinz's comments, however, make it impossible to take this statement at face value. The senator explicitly stated that the final version of the bill did not contain an omnibus clause because such a provision would be "beyond the legitimate scope of this witness protection measure [and]

is probably duplicative of [o]bstruction of justice statues already in the books." 128 CONG. REC. S26,810. This statement would make no sense if Senator Heinz truly believed that the new law excluded witness tampering from the scope of § 1503's omnibus clause: Congress would hardly omit a new provision from the final legislation as duplicative of an existing law and simultaneously repeal the older provision. Also, as the quoted language suggests, the 1982 Act dealt with protecting witnesses and victims from harassment and injury, rather than with obstruction of justice. *See id.* at 26,809-10. If Congress believed that obstruction of justice was "beyond the legitimate scope" of the VWPA, it is hard to believe that it intended the new law to have such an impact on the obstruction of justice statute. In the end, even if we were inclined to think that a single Senator's remarks[4] as to the meaning of a bill could indicate a clear Congressional intent to repeal an earlier law by implication, Senator Heinz's remarks are, taken as a whole, far too ambiguous to carry such a heavy burden.

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[4] Although Senator Heinz was the sponsor of the Senate bill, it was the House bill that ultimately passed both houses. And, as the two versions differed on this precise point, we question the Second Circuit's decision to accord so much weight to Senator Heinz's comments. *Compare Hernandez*, 730 F.2d at 899, *with Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) ("[O]ne isolated remark by a single Senator, ambiguous in meaning when examined in context, is insufficient to establish the kind of affirmative congressional expression necessary to evidence an intent to abrogate [treaty provisions]."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."). *Cf.* 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTR. §§ 48.14, 48.15 (5th ed.1992) (discussing weight to be given to statements of committeemen and sponsors).

2. The 1988 Amendment

The Tacketts argue that if the 1982 Act did not serve to repeal the operation of the omnibus clause of § 1503 regarding witnesses then the Anti- Drug Abuse Act of 1988, Pub.L. 100-690, 102 Stat. 4181, did. *See Masterpol*, 940 F.2d at 763. Again, we disagree. The 1988 Act merely added non-coercive witness tampering to § 1512's prohibitions. As with the earlier amendments, it cannot be argued that there is any repugnancy between the two provisions: they are parallel. We can therefore find a repeal only if Congress clearly intended that there be one. Neither the appellants' brief nor the cases cited therein point to any evidence of such an intent, and we can find nothing in the text or the legislative history of the 1988 Act--other than the change to § 1512--that suggests any. In fact, all the evidence points in just the opposite direction. For example, the section-by-section analysis of the 1988 legislation, after discussing the Second Circuit's treatment of just this issue, notes that

> [s]ections 7029(c) and (d) are intended, therefore, merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503. It would permit prosecution of such conduct in the Second Circuit, where it is not now permitted, and would allow such prosecutions in other circuits to be brought under section 1512 rather than under the catch-all provision of section 1503.

134 CONG. REC. S17,369 (1988) (statement of Senator Biden) (emphasis added). *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTR. § 48.14 (5th ed.1992) (noting that statements made

in reporting a bill out of committee are accorded the same weight as committee reports). This suggests that the drafters of the 1988 legislation believed both that the omnibus clause of § 1503 still prohibited witness tampering and also that prosecutions under their proposed law would be allowed to proceed under either provision. In any case, this seems to be the sole evidence of Congress's intent in passing the 1988 amendments to § 1512, and it certainly does not constitute clear evidence of an intent to effect any change to the scope of § 1503. As noted above, the overlap between the two provisions by itself demonstrates nothing. *Wood*, 41 U.S. (16 Pet.) at 362-63. We therefore conclude that the omnibus clause continues to prohibit witness tampering.

B. Whether the Tacketts' Conduct Constituted an Obstruction of Justice

Appellants next argue that their convictions under § 1503 must be reversed because the evidence showed that by the time of their attempts to influence Kirby the government had decided not to have him testify before the grand jury and was instead using him to gather evidence to prosecute the Tacketts for obstructing justice. This argument comprises two separate claims. The first claim is that at the time of the taped conversation Kirby was acting as part of an ATF, not a grand jury, investigation. *See United States v. Ryan*, 455 F.2d 728, 734-35 (9th Cir. 1971) (overturning § 1503 conviction where defendant was not subject of grand jury investigation); *Mullins*, 22 F.3d at 1370 ("The issue in *Ryan*, we believe, was whether the investigation was being conducted by the IRS, in which case § 1503 did not apply, or by the grand jury."). The second claim is that we must reverse the conviction because, by the time of the taped conversations, the government had decided not to have Kirby testify before the grand jury. *See United States v. Bashaw*, 982 F.2d 168, 172 (6th Cir. 1992)

(reversing conviction for endeavoring to intimidate jurors because "the jurors' duty as far as [the case in question] was over").

The first claim fails on its facts. Although the Tacketts suggest that the government ordered Kirby to contact them in order to trick them into asking him to perjure himself before the grand jury, ATF agent Wilt testified that he had arranged the meeting in order to determine whether Kirby's most recent version of the events surrounding the date on the ATF Form 4473 was truthful. J.A. at 182. Because the government had convened the grand jury specifically to investigate "the accuracy of this form and the circumstances surrounding it," *id.* at 180, Kirby and Wilt were acting in furtherance of the grand jury investigation.

The second claim fails on the law. Although the omnibus clause of § 1503 requires that the prosecution prove that a defendant's actions were intended to obstruct an actual judicial proceeding, *Mullins*, 22 F.3d at 1370, the government need not prove that the actions had their intended effect. *Osborn v. United States*, 385 U.S. 323, 333 (1966); *United States v. Atkin*, 107 F.3d 1213, 1218 (6th Cir. 1997). Furthermore, an endeavor to obstruct justice violates the law even if, unbeknownst to the defendant, the plan is doomed to failure from the start. *Osborn*, 385 U.S. at 333; *United States v. Mitchell*, 514 F.2d 758, 761-62 (6th Cir. 1975). In *Osborn*, for example, the defendant hoped to bribe a juror in an upcoming criminal trial. 385 U.S. at 324. Unfortunately for Osborn, the man he hired to make the arrangements was--like Kirby--already cooperating with federal investigators. *Id.* at 325. Osborn argued that since the intermediary never actually approached the prospective juror and, being a double agent, never even intended to, "any endeavor on [Osborn's] part was

impossible of accomplishment." *Id.* at 332. The Court rejected the argument because the omnibus clause "is not directed at success in corrupting a juror, but at the endeavor to do so."[5] *Id.* at 333 (citation and internal quotation marks omitted). *Accord Mitchell*, 514 F.2d at 762. The Tacketts, knowing that the grand jury was investigating the events surrounding the ATF form, tried to persuade Kirby to present false testimony, and they were properly convicted for endeavoring to obstruct justice.[6]

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[5]The Supreme Court has recently held that the "endeavor must have the natural and probable effect of interfering with the due administration of justice." *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (citation and internal quotation marks omitted). Appellants have not argued that this requirement renders their convictions invalid, and we do not think that it does. This requirement serves merely to ensure that defendants are not convicted for making false statements unless they have some notice that those falsehoods might have some effect on a judicial proceeding. *Id.* at 601; *Atkin*, 107 F.3d at 1219. This requirement is clearly met in this case.

[6]The Tacketts' reliance on *United States v. Simmons*, 591 F.2d 206, 210 (3d Cir. 1979), for the proposition that their convictions must be overturned because, as the time of their meetings with Kirby, "there was no presently contemplated presentation of evidence by Kirby before the grand jury" is misplaced. *See* Appellants' Br. at 24. Simmons stated that the correct inquiry was "whether the subpoena is issued in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before the grand jury." 591 F.2d at 208-09 (emphasis added). *See United States v. Nelson*, 852 F.2d 706, 711 (3d Cir. 1988) (question is "whether the requisite present intention existed at the time the subpoena was issued"). There is no question that when the subpoena issued the government intended that Kirby would actually testify. See J.A. at 180. *Cf.* Appellants' Br. at 24. Furthermore, the quoted language makes it clear that the "presently contemplated" language serves as a proxy for the real question, which is whether the subpoena was issued in furtherance of the grand jury's, rather than a police, investigation.

C. Sufficiency of Evidence as to Intent to Falsify the ATF Form 4473

Grayson Tackett argues that there was insufficient evidence for the jury to find that he knew that the statements he made on the ATF Form 4473 were false. We will reverse a jury verdict on such grounds only if no rational juror could have found that the government had proved a necessary element of the crime beyond a reasonable doubt. *Bashaw*, 982 F.2d at 171.

1. The False Date

Tackett claims that the government presented insufficient evidence that he knew, at the time he assisted Kirby in completing the Form 4473, that the December 16 date was false, because he never explicitly stated to Kirby that he was asking him to falsify the date. Direct evidence of bad intent is unnecessary. Kirby testified that he twice told Tackett that the gun had been purchased early in 1991 and that Tackett responded first by saying that he believed it to have been in December of that year, then with "put down 12-16, that's a good date." J.A. at 249. Kirby's testimony regarding the transaction could itself support a reasonable inference that the two tacitly agreed to put down a false date. *Id.* at 249-50 (Tackett "was kindly insistent on [the December 16 date] and I didn't see any problem with it because I didn't have any idea of any significance to the date, so that's what it was."). Moreover, there was ample evidence that Grayson Tackett was making a concerted effort to sabotage the case against his son by introducing false evidence into the investigation. The government produced evidence that Tackett had asked Kirby to testify falsely as to the date of purchase and read for the jury Tackett's own testimony at his son's trial that he had gone

to see Kirby with "one thing on [his] mind ... to help [his] son." *Id.* at 424. In light of these other ways in which Tackett had tried to help his son escape punishment in his criminal trial, the jury could reasonably have inferred that his visit to Kirby was made to convince him to put what Tackett knew to be a false date on the 4473 form.[7]

2. Who Purchased the Gun

Grayson Tackett also claims that when he filled out the form he did not know that putting his name on it was dishonest, because he was the real purchaser and Brian had merely been paying for and picking up the gun. Again, we will not upset a jury verdict supported by reasonable inferences. The jury knew that Tackett had a strong motive to lie on the form, had in fact put a false date on the form, and had then tried to induce Kirby to lie to the grand jury as to the whole transaction. This is ample evidence to infer scienter.

Tackett's attempt to rely on *United States v. Isaacs*, 539 F.2d 686 (9th Cir. 1976), is misplaced. Isaacs had replied "no" to a question on an ATF Form 4473 that asked him whether he was under indictment. *Id.* at 687. In fact, he had recently been charged by information. The court overturned his conviction under a Federal Rule of Criminal Procedure 52(b) clear error standard for making a false statement

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[7]Tackett makes much of an inconsistency in Kirby's testimony as to the real date of purchase. Defense counsel cross-examined Kirby extensively as to this error, but, in light of the verdict, apparently failed to impeach his credibility. See J.A. at 387. Credibility questions are for the jury, not for us; in any case, a mistake of what might have been only a few days, at a trial more than four years after the event in question, certainly does not suggest that the rest of Kirby's testimony should be ignored.

because his answer was undisputably "literally true": Isaacs was not under an indictment. *Id.* at 688 & n. 1. Here, on the other hand, the evidence suggests that Brian, not Grayson, Tackett was the true purchaser, and Isaacs is inapposite.

D. Sentencing

Finally, appellants contest the district court's use of U.S.S.G. § 2J1.2(b)(2) to enhance their sentence. Under that provision, an offense that results in a "substantial interference with the administration of justice" warrants a three-level increase, in this case moving both defendants from offense level 12 to level 15. J.A. at 47, 76. The enhancement applies if the defendants cause an "unnecessary expenditure of substantial governmental or court resources." U.S.S.G. § 2J1.2(b)(2) commentary, applic. note 1. The Tacketts argue that because the district court failed to make an independent finding that any government resources had been wasted, we should either reduce their sentences or remand for resentencing. We agree that a remand is necessary.

The presentence report (PSR) prepared for each defendant stated that the Tacketts delayed the investigation of their son and caused the government to waste time and effort. J.A. at 47, 76. It additionally stated that "[t]he defendant's actions also necessitated a separate investigation which led to additional prosecutions." *Id.* At sentencing, however, defense counsel argued that his clients' conduct had not, in fact, had this effect at all. *Id.* at 589, 593. To further complicate matters, the government argued at sentencing that § 2J1.2(b)(2) was not the correct guideline, but that § 2J1.2(c) and, by cross reference, § 2X3.1, should apply to increase defendants' total offense level to 18. *Id.* at 586. After listening to these factual and legal arguments, the district court

sentenced both defendants as recommended in the respective PSRs without ruling on the government's legal argument or making any findings of fact. *Id.* at 596-99.

Federal Rule of Criminal Procedure 32(c)(1) states that, "[a]t the sentencing hearing .... [f]or each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." This circuit requires "literal compliance" with this provision. *United States v. Fry*, 831 F.2d 664, 667 (6th Cir.1987).[8] This strict requirement helps to ensure that defendants are sentenced on the basis of accurate information and provides a clear record for appellate courts, prison officials, and administrative agencies who may later be involved in the case. *Fry*, 831 F.2d at 667. *See United States v. McMeen*, 49 F.3d 225, 226 (6th Cir.1995) ("When a contested sentencing enhancement factor appears in the probation report and is not proved by the government at the hearing, the court must insure that the factor is otherwise proved by reliable evidence before using it to increase the sentence."). If the sentencing court fails to make these factual findings, we must remand for resentencing. *United States v. Edgecomb*, 910 F.2d 1309, 1313 (6th Cir.1990).

The district court made no independent findings regarding the basis for the obstruction of justice enhancement. The

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[8] *Fry* and several of the other cases cited discuss the predecessor of the current Rule 32(c)(1), the former Rule 32(c)(3)(D). The provisions are identical. Fed. R.Crim. P. 32(c) Advisory Committee Notes (1994 Amendments) ("Subdivision (c) ... makes no major changes in current practice.... Subdivision (c)(1) (formerly subdivision (c)(3)(d))....").

court listened to counsels' arguments as to the enhancement, J.A. at 586-87, 589-90, 593 and then pronounced the sentences as calculated in the PSR, *id.* at 596-598. The district judge was completely silent when imposing sentence as to the enhancement: he addressed neither the hotly contested factual question of how much wasted time and effort defendants' conduct had caused nor the issue of which guideline should apply. The judgment in each case states simply that "[t]he court adopts the factual findings and guideline applications in the presentence report." *Id.* at 35, 66. This is a far cry from the making of a finding for each matter controverted, as the plain language of Rule 32 requires. *See United States v. Mandell*, 905 F.2d 970, 974 (6th Cir. 1990) (rejecting claim that Rule 32 is satisfied where it is plain from the district court's sentence that it adopted findings in PSR, because express findings are needed "to ensure that the defendant's concerns over disputed allegations in the presentence report have been considered by the district court whose reasoning is shown on the record for both the benefit of the defendant and for us on review") (emphasis added) (citation omitted). From the record before us, it is impossible to know whether the district court made an independent evaluation of the evidence. We therefore remand the cases for resentencing.

CONCLUSION

For the reasons discussed above, we **AFFIRM** the Tacketts' convictions but **VACATE** their sentences and **REMAND** both cases to the district court for resentencing in accordance with Rule 32(c).

Nos. 95-6127/6128

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LINDA TACKETT (95-6127);
GRAYSON TACKETT (95-6128),
Defendants-Appellants.

ORDER

Before: JONES, RYAN, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
DEC 23 1997
CLERK

No. 97-521

In the Supreme Court of the United States

OCTOBER TERM, 1997

LINDA TACKETT AND GRAYSON TACKETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18 pp

QUESTIONS PRESENTED

1. Whether a corrupt endeavor to influence a grand jury witness may be prosecuted under 18 U.S.C. 1503.

2. Whether petitioners were properly convicted of endeavoring to obstruct justice under 18 U.S.C. 1503, notwithstanding that the subpoenaed witness whom they sought to influence was never called to testify.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-521

LINDA TACKETT AND GRAYSON TACKETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 113 F.3d 603.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1997. A petition for rehearing was denied on June 23, 1997. The petition for a writ of certiorari was filed on September 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioners Linda and Grayson Tackett were convicted of

obstruction of justice, in violation of 18 U.S.C. 1503. In addition, Grayson Tackett was convicted of making a false statement on a required firearm record, in violation of 18 U.S.C. 924(a)(1)(A). Pet. App. A4-A5. Linda Tackett was sentenced to 21 months' imprisonment, to be followed by two years of supervised release, and fined $4,000. Grayson Tackett was sentenced to 18 months' imprisonment, to be followed by two years of supervised release, and fined $4,000. Gov't C.A. Br. 2.

1. On December 6, 1991, petitioners' son, Brian Tackett, burned down a church in Bowling Green, Kentucky. In June 1992, he was indicted, along with several other individuals, in the United States District Court for the Western District of Kentucky for conspiring to commit arson, in violation of 18 U.S.C. 371. In addition, he was charged with arson, in violation of 18 U.S.C. 844(i); interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312; and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. A2; Gov't C.A. Br. 2-3.

The firearm that Brian Tackett was charged with carrying when he burned the church was a .45 caliber Colt pistol. Steve Kirby, a federally licensed firearms dealer, sold the pistol to Brian Tackett in March or April 1991, but Kirby did not complete an ATF Form 4473 for the transaction (as required by 27 C.F.R. 178.124) or record the sale in his transfer log (as required by 27 C.F.R. 178.125(e)). Pet. App. A3; Gov't C.A. Br. 3.

In September 1992, three months after his son was indicted, Grayson Tackett visited Kirby's gun shop. He asked Kirby to fill out an ATF Form 4473 to show that Grayson Tackett, not his son, had purchased the

.45 caliber Colt pistol from Kirby on December 16, 1991. Kirby did so. At that time, he did not realize the significance of the false transaction date, which was ten days after the church had burned down. Pet. App. A3; Gov't C.A. Br. 3-4.

In early 1993, Linda Tackett obtained a copy of the falsified ATF Form 4473 from Kirby and gave the form to her son's lawyer. On February 16, 1993, her son's lawyer filed a motion to dismiss the firearms count of the indictment based on the form. Shortly thereafter, ATF Agent Ray Wilt received a copy of the motion and the form. On February 22, 1993, Agent Wilt questioned Kirby about the form, but Kirby maintained that the form was correct. Pet. App. A3; Gov't C.A. Br. 4-5.

On March 3, 1993, Agent Wilt interviewed Kirby again. Changing his story, Kirby told the agent that petitioners' son had purchased the pistol in early 1991. Kirby asserted that the ATF Form 4473 had been altered, but he denied that he had altered the form himself. The following day, Agent Wilt served Kirby with a subpoena to testify before a grand jury. Kirby then told the agent that he had falsified the form when Grayson Tackett visited his gun shop in September 1992. Kirby agreed to cooperate with the agent and to arrange a tape-recorded meeting with petitioners to verify that his account was true. Pet. App. A3-A4; Pet. 11-12; Gov't C.A. Br. 5-6.

Kirby telephoned petitioners and set up a meeting at his gun shop. During that meeting, on March 5, 1993, Kirby told petitioners that he had been subpoenaed by a grand jury to answer questions about the ATF Form 4473. He reminded petitioners that their son had purchased the .45 caliber Colt pistol in early 1991, but petitioners told Kirby to "stick to [his]

records" and to tell the grand jury that Grayson Tackett purchased the pistol on December 16, 1991. Pet. App. A4; Gov't C.A. Br. 7-8.

During a subsequent meeting on March 7, 1993, Grayson Tackett gave Kirby a letter written by Linda Tackett. The letter instructed Kirby to tell the grand jury that he had never sold any guns to petitioners' son, and that "[t]he only people that know the real truth are Grayson and me." It further instructed Kirby to testify that he sold the .45 caliber Colt pistol to Grayson Tackett on December 16, 1991, and that Kirby had the pistol in his possession before that date. Pet. App. A4; Gov't C.A. Br. 8-10.

On March 8, 1993, Agent Wilt testified before the grand jury about his investigation of the ATF Form 4473. Kirby did not testify before the grand jury. That same day, the grand jury returned a two-count indictment against petitioners. Pet. App. A4; Gov't C.A. Br. 10.

2. Petitioners were tried on a three-count superseding indictment. Both petitioners were convicted of endeavoring to obstruct justice between March 5 and 7, 1993, by asking Kirby to give false testimony under oath to the grand jury, in violation of 18 U.S.C. 1503. Grayson Tackett was also convicted of making a false statement on the ATF Form 4473, in violation of 18 U.S.C. 924(a)(1)(A).[1]

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[1] At the close of the government's proof at trial, the district court granted petitioners' motion to dismiss a third count of the indictment charging an additional violation of Section 1503. Pet. App. A4 n.3; C.A. App. 448-450.

3. The court of appeals affirmed petitioners' convictions, but remanded for resentencing. Pet. App. A1-A22.[2] The court rejected petitioners' argument that prosecutions for obstructing justice by tampering with a witness may be brought only under 18 U.S.C. 1512, and not under the omnibus clause of 18 U.S.C. 1503, which prohibits, *inter alia*, "corruptly * * * endeavor[ing] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. 1503(a). See Pet. App. A5-A15. The court concluded that Congress did not implicitly repeal the omnibus clause of Section 1503 when it enacted the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat. 1249-1253. That Act adopted Section 1512 to deal with witness tampering and simultaneously deleted provisions from Section 1503 that specifically addressed efforts to influence or injure witnesses. Pet. App. A5-A13. The court likewise concluded that the omnibus clause of Section 1503 was not implicitly repealed by the Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. B, § 7029(c), 102 Stat. 4398, which included non-coercive witness tampering within the scope of Section 1512. Pet. App. A14-A15. The court accordingly held that "the omnibus clause [of Section 1503] continues to prohibit witness tampering." *Id.* at A15. The court noted that, of the eight circuits that had previously addressed the question, only one had reached a contrary conclusion. *Id.* at A5 (citing cases).

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[2] The court ordered resentencing on the ground that the sentencing judge had not made required findings with respect to disputed matters under the Sentencing Guidelines. Pet. App. A20-A22.

The court of appeals also rejected petitioners' claim that their conduct did not constitute obstruction of justice, within the meaning of Section 1503, because the government had already decided not to call Kirby as a grand jury witness before petitioners attempted to influence his testimony. Pet. App. A15-A17. Citing *Osborn* v. *United States*, 385 U.S. 323, 333 (1966), the court explained that Section 1503 requires only that a defendant attempt to obstruct a judicial proceeding, not that he succeed in doing so. Pet. App. A16. An endeavor to obstruct justice violates Section 1503, therefore, "even if, unbeknownst to the defendant, the plan is doomed to failure from the start." *Ibid.* Accordingly, because petitioners, "knowing that the grand jury was investigating the events surrounding the ATF form, tried to persuade Kirby to present false testimony," they were properly convicted under Section 1503. *Id.* at A17.

ARGUMENT

1. Petitioners contend (Pet. 17-20) that prosecutions for obstructing justice by tampering with a witness may be brought only under 18 U.S.C. 1512, and not under 18 U.S.C. 1503. The court of appeals, consistent with seven of the eight other circuits that have addressed the issue, correctly rejected that claim. The issue does not merit further review.

a. The witness tampering statute, Section 1512, specifically prohibits attempts to influence a witness's testimony. The obstruction of justice statute, Section 1503, specifically prohibits endeavors to influence jurors or court officials, and more generally prohibits other efforts to obstruct justice.

Section 1503 previously contained a provision prohibiting endeavors to "influence, intimidate, or im-

pede any witness," or to injure a witness, "on account of his testifying or having testified." 18 U.S.C. 1503 (1976). Congress deleted that provision in 1982, at the same time that it enacted Section 1512. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a) and (c), 96 Stat. 1249-1250, 1253. Congress did not, however, alter the "omnibus" clause of Section 1503. That clause generally prohibits "influenc[ing], obstruct[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. 1503(a). The omnibus clause had been used to prosecute witness tampering before 1982 notwithstanding the more specific witness provisions elsewhere in the statute.[3]

As originally enacted, Section 1512 prohibited only witness tampering through threats and violence. In 1988, Congress amended Section 1512 to include witness tampering by "corrupt[] persua[sion]." See Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. B, § 7029(c), 102 Stat. 4398. Again, however, Congress did not alter Section 1503's omnibus clause.

b. The court of appeals correctly held that Section 1512, as enacted in 1982 and as amended in 1988, did not implicitly repeal the omnibus clause of Section 1503 as applied to witness tampering. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986). The Court has thus stated that one statute will not be held to have

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[3] See, *e.g.*, *United States* v. *Johnson*, 605 F.2d 729, 730-731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); *United States* v. *McCarty*, 611 F.2d 220, 224 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980).

implicitly repealed another unless the two statutes are in "irreconcilable conflict" or the later statute "covers the whole situation of the earlier one and is clearly intended as a substitute." *Ibid.*

Neither standard is satisfied here. There is no "irreconcilable conflict" between Section 1503 and Section 1512. Those statutes define distinct criminal offenses and, by refraining from committing both offenses, individuals may easily comply with both statutes. Section 1512 does not cover "the whole situation" of the omnibus clause of Section 1503. Each statute prohibits substantial conduct that is not prohibited by the other. Nor is there any indication that Section 1512 was "clearly intended as a substitute" for the omnibus clause of Section 1503. The two statutes were designed to serve different, albeit complementary, goals: Section 1503 protects judicial proceedings against corruption, by whatever means, whereas Section 1512 protects witnesses themselves, whether or not a judicial proceeding has commenced.

As noted above, Section 1512, as enacted in 1982, applied only to witness tampering through threats and violence, whereas Section 1503 also covered attempts to bribe or otherwise corruptly persuade a witness. Accordingly, if the original Section 1512 had implicitly repealed the omnibus clause of Section 1503 as applied to witnesses, it would have decriminalized non-coercive witness tampering. The court of appeals recognized that "[t]here is, of course, absolutely no indication that Congress intended" its adoption of Section 1512 to produce such an anomalous result. Pet. App. A12.

Moreover, although Congress amended Section 1512 in 1988 to include non-coercive witness tampering, Congress did not suggest that Section 1512, as

amended, was a substitute for the omnibus clause of Section 1503. The amendment eliminated any uncertainty created by the Second Circuit's aberrational holding that Section 1512 had partially repealed Section 1503 (see *United States* v. *Hernandez*, 730 F.2d 895 (1984)) by making clear that non-coercive witness tampering remained a federal crime. The principal author of the amendment thus explained that its purpose was "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (*and is*) found in section 1503." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (emphasis added); see Pet. App. A14-A15 (observing that the legislative history "suggests that the drafters of the 1988 legislation believed both that the omnibus clause of § 1503 still prohibited witness tampering and also that prosecutions under their proposed law would be allowed to proceed under either provision").

The existence of some overlap in the conduct prohibited by Section 1503 and Section 1512 does not indicate implicit repeal. See *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) ("The fact that there is now some overlap between § 1503 and § 1512 * * * hardly leads to the conclusion that § 1503 was, to the extent of the overlap, silently repealed."). It is not unusual for a particular act to violate more than one criminal statute. In such situations, a defendant may be punished under any statute that he has violated. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-126 (1979); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).

c. All but one of the circuits that have addressed the question have agreed with the court below that

the omnibus clause of Section 1503 continues to apply to witness tampering. See, *e.g.*, *United States* v. *Maloney*, 71 F.3d 645, 659 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996); *United States* v. *Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992), cert. denied, 507 U.S. 944 (1993); *United States* v. *Kenny*, 973 F.2d 339, 342-343 (4th Cir. 1992); *United States* v. *Marrapese*, 826 F.2d 145 (1st Cir.), cert. denied, 484 U.S. 944 (1987); *United States* v. *Risken*, 788 F.2d 1361 (8th Cir.), cert. denied, 479 U.S. 923 (1986); *United States* v. *Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984); *United States* v. *Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985), cert. denied, 474 U.S. 1076, 1106 (1986); *United States* v. *Wesley*, 748 F.2d 962, 964-965 (5th Cir. 1984), cert. denied, 471 U.S. 1130 (1985). Only the Second Circuit has held that witness tampering may no longer be prosecuted under Section 1503 and must be prosecuted under Section 1512. See *United States* v. *Hernandez*, 730 F.2d at 899; accord *United States* v. *Gabriel*, 125 F.3d 89, 104 n.12 (2d Cir. 1997); *United States* v. *Masterpol*, 940 F.2d 760, 762-763 (2d Cir. 1991). This Court has repeatedly denied certiorari on the issue. See, *e.g.*, *Branch* v. *United States*, 488 U.S. 1018 (1989); *Risken* v. *United States*, 479 U.S. 923 (1986); *Rovetuso* v. *United States*, 474 U.S. 1076 (1986); *Cooper* v. *United States* and *Wesley* v. *United States*, 471 U.S. 1130 (1985).[4]

Although, for the reasons discussed above, the Second Circuit's view limiting the use of Section 1503 with respect to witness tampering is incorrect, the

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[4] The Court declined to reach the issue in *United States* v. *Aguilar*, 515 U.S. at 600 & n.1. Justice Scalia, in an opinion joined by Justice Kennedy and Justice Thomas, concluded that Section 1512 did not implicitly repeal the omnibus clause of Section 1503 as applied to witness-related conduct. See *id.* at 615-616 (Scalia, J., concurring in part and dissenting in part).

present conflict appears to be of little practical importance. As a result of the 1988 amendment that extended Section 1512 to non-coercive witness tampering, most of the witness-related conduct that is prosecuted in other circuits under Section 1503 may be prosecuted in the Second Circuit under Section 1512. See *United States* v. *Aguilar*, 21 F.3d 1475, 1485 & n.6 (9th Cir. 1994) (en banc) (observing that the 1988 amendment to Section 1512 "obviated" the circuit conflict on this issue), aff'd in part and rev'd in part on other grounds, 515 U.S. 593 (1995).

2. Petitioners also contend (Pet. 20-22) that they were not properly convicted under Section 1503 of endeavoring to obstruct a judicial proceeding, because the government had already decided not to call Steve Kirby, the gun dealer, to testify before the grand jury by the time that petitioners sought to influence him. That fact-specific issue, which petitioners concede presents no circuit conflict (Pet. 22), does not merit further review.

Petitioners do not contest that there was, in fact, a grand jury proceeding underway to investigate the circumstances surrounding the ATF form, or that Kirby had been subpoenaed on March 4, 1993, to testify before that grand jury on March 8, 1993. Pet. 12.[5] Nor do they dispute that they were aware

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[5] The prosecutor conducting the grand jury investigation testified that, after Kirby received the subpoena and changed his story on March 4, 1993, "there was no longer a compelling need for [Kirby] to testify," and that he "estimate[d] then that Special Agent Wilt would have testified as a grand jury witness concerning the entire investigation." C.A. App. 264-265. While the subpoena to Kirby was not formally withdrawn, the prosecutor advised Kirby on March 7, 1993, that he would not

of those facts on March 5 and March 7, when they attempted to influence Kirby's grand jury testimony. Pet. 13. The court of appeals correctly concluded that it was irrelevant, in those circumstances, whether the government still intended to use Kirby as a grand jury witness. As the court explained, petitioners were convicted of *endeavoring* to obstruct justice, and "an endeavor to obstruct justice violates the law even if, unbeknownst to the defendant, the plan is doomed to failure from the start." Pet. App. A16. See *Osborn* v. *United States*, 385 U.S. 323, 333 (1966) (Section 1503 "is not directed at success in corrupting a juror but at the 'endeavor' to do so").

To the extent that petitioners purport to rely on this Court's decision in *United States* v. *Aguilar*, *supra*, any such reliance is misplaced. See Pet. 21 (acknowledging that petitioners did not argue on appeal that *Aguilar* bars their conviction). In *Aguilar*, the Court held that a defendant's "endeavor must have the natural and probable effect of interfering with the due administration of justice" in order to violate the omnibus clause of Section 1503. 515 U.S. at 599 (internal quotation marks omitted). That standard was not satisfied in *Aguilar* because the evidence did not indicate that the defendant contemplated that his false statement to an investigator would be conveyed to a grand jury. *Id.* at 601. The Court did not indicate in *Aguilar* that a defendant's conduct must actually interfere with the administration of justice. To the contrary, the Court explained that Section 1503's omnibus clause is violated "where the defendant acts with an intent to obstruct justice, and in a manner

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be required to attend the grand jury session scheduled for the next day. *Id.* at 273.

that is likely to obstruct justice, but is foiled in some way." *Id.* at 601-602. The Court therefore noted that a jury could properly find a defendant guilty under Section 1503 if, in circumstance similar to those here, "a defendant with the requisite intent [were] to lie to a subpoenaed witness who is ultimately not called to testify." *Id.* at 602. Unlike the defendant in *Aguilar*, there was no question here that petitioners had the requisite intent and acted in a manner that was likely to obstruct justice, had the facts been as they believed them to be.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
WILLIAM C. BROWN
Attorney

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